



SCHOOL OF LAW

UNIVERSITY of CALIFORNIA • IRVINE

*Legal Studies Research Paper Series No. 2015-70*

***ESSAY***

***ELECTION LAW'S PATH IN THE ROBERTS COURT'S FIRST  
DECADE: A SHARP RIGHT TURN BUT WITH SPEED BUMPS  
AND SURPRISING TWISTS***

*Richard L. Hasen*

[rhasen@law.uci.edu](mailto:rhasen@law.uci.edu)

*University of California, Irvine ~ School of Law*

The paper can be downloaded free of charge from SSRN at:



ESSAY

# Election Law's Path in the Roberts Court's First Decade: A Sharp Right Turn but with Speed Bumps and Surprising Twists

Richard L. Hasen\*

**Abstract.** The first decade of election law cases at the Supreme Court under the leadership of Chief Justice Roberts brought election law down a strongly conservative path in cases involving issues from campaign finance to voting rights to election administration. Nonetheless, the Roberts Court, while dominated by a majority of five conservative Justices until the recent death of Justice Antonin Scalia, had not gone as far right as it could have or as some had predicted.

This Essay describes the path of election law jurisprudence in the Roberts Court and then considers two questions. First, what explains why the Court, while shifting in a strongly conservative direction, has not moved more extremely to the right? Second, what options has the Court left for election reformers who are unhappy with the strongly conservative, although not maximally conservative, status quo?

On the first question, a combination of factors appears to explain the trajectory and speed of the Roberts Court's election law decisions. The Roberts Court has been fundamentally conservative, but for jurisprudential, temperamental, or strategic reasons, Justices who have held the balance of power appear to prefer incrementalism to radical change. Mandatory appellate jurisdiction appeared the best way to force the Roberts Court's hand, and it often (but not always) led to a conservative result. Nearly half of the Roberts Court's election cases came on mandatory jurisdiction. Finally, the five conservative Justices were not monolithic in their views and were capable of surprise.

On the second question, the Court has left very limited space for reform in certain areas, such as campaign finance. Where the Court has greatly constrained choice, only minor improvements are possible absent a change in the Supreme Court's personnel. In these areas, the problem is not that reformers have a "romanticized" vision of democracy; it is that the structural impediments erected by the Court have hobbled meaningful reform efforts. In contrast, in areas in which the Court has mostly left room for decentralized

---

\* Chancellor's Professor of Law and Political Science, UC Irvine School of Law. Thanks to Erwin Chemerinsky, Gene Mazo, Spencer Overton, Rick Pildes, Michael Solimine, Nick Stephanopoulos, and participants at the *Stanford Law Review* 2016 symposium on the law of democracy for useful comments and suggestions.

*Election Law's Path in the Roberts Court's First Decade*  
68 STAN. L. REV. 1597 (2016)

election law approaches, such as in the arena of election administration, election fights are becoming both legal and political. Much of the space for reform efforts depends upon the future composition of the Court.

Part I briefly describes the path of election law in the Roberts era across key election law areas including campaign finance, voting rights, and election administration. Part II explains why the Roberts Court has been deeply conservative but not consistently maximalist. Part III considers the space for election reform in the Roberts Court era and beyond.

**Table of Contents**

Introduction .....	1599
I. The Roberts Court's Election Law Path.....	1601
A. Campaign Finance.....	1602
B. Voting Rights Act.....	1606
C. Election Administration.....	1609
D. Other Cases.....	1611
II. Explaining the Conservative, but Not Maximalist, Turn .....	1614
A. The Long Game?.....	1616
B. Mandatory Appellate Jurisdiction and Strategic Litigation Choices.....	1618
C. Conservative Variance.....	1623
III. Options for Election Reform in the Roberts Court Era.....	1624
A. Campaign Finance Reform.....	1625
B. Voting Rights Act Reform.....	1627
C. Partisan Gerrymandering Reform.....	1628
D. Election Administration Reform.....	1629
E. Expectations for the Future.....	1630
Conclusion.....	1631
Appendix .....	1632
Roberts Court Election Law Opinions 2006-2015 .....	1632

## Introduction

The first decade of election law cases at the Supreme Court under the leadership of Chief Justice Roberts brought election law down a strong conservative path. *Citizens United v. FEC*<sup>1</sup> freed corporate money in U.S. candidate elections and opened up a deregulatory era increasingly dominated by nominally independent “Super PACs” and other outside groups.<sup>2</sup> *Shelby County v. Holder*<sup>3</sup> eviscerated the congressional regime codified in section 5 of the Voting Rights Act, under which Congress required states and localities with a history of racial discrimination in voting to obtain federal permission before making a change in voting rules by proving that the change would not make minority voters worse off. In the case’s wake, previously covered jurisdictions have adopted a number of election changes,<sup>4</sup> which no doubt have made minority voters worse off. In *Crawford v. Marion County Election Board*, the Court gave the green light to state voter identification laws,<sup>5</sup> despite a lack of evidence that such laws are necessary to deter fraud or instill voter confidence.<sup>6</sup> Republican states have increasingly tightened voting rules in *Crawford*’s wake.<sup>7</sup>

Nonetheless, the Roberts Court, while dominated by a majority of five conservative Justices until the recent death of conservative Justice Antonin Scalia,<sup>8</sup> had not gone as far right as it could have or as I, among others, had predicted.<sup>9</sup> In the campaign finance arena, the Court refused to take cases to strike down the ban on direct corporate contributions to candidates or to reopen the ability of political parties to take large “soft money” contributions.<sup>10</sup> It did not eliminate individual contribution limits, even as Super PACs and other campaign groups undermined them.<sup>11</sup> In the voting

---

1. 558 U.S. 310 (2010).

2. See RICHARD L. HASEN, PLUTOCRATS UNITED: CAMPAIGN MONEY, THE SUPREME COURT, AND THE DISTORTION OF AMERICAN ELECTIONS 33-34 (2016).

3. 133 S. Ct. 2612 (2013).

4. See DANIEL HAYS LOWENSTEIN ET AL., ELECTION LAW: CASES AND MATERIALS 63 (5th ed. Supp. 2015).

5. 553 U.S. 181, 185, 189 (2008) (plurality opinion).

6. See *id.* at 224 (Souter, J., dissenting) (suggesting state concerns about voter fraud “can claim modest weight at best”).

7. See Richard L. Hasen, *Race or Party?: How Courts Should Think About Republican Efforts to Make It Harder to Vote in North Carolina and Elsewhere*, 127 HARV. L. REV. F. 58 (2014).

8. Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 13, 2016), <http://nyti.ms/20vxbrH>.

9. Richard L. Hasen, *No Exit?: The Roberts Court and the Future of Election Law*, 57 S.C. L. REV. 669, 672 (2006).

10. See *infra* Part I.A.

11. *Id.*

rights arena, the Court declined cases that would further limit the scope of, or find unconstitutional, section 2 of the Voting Rights Act, a key remaining protection for minority voters, and it revived the racial gerrymandering cause of action in a way that can help minority plaintiffs fight Republican gerrymanders.<sup>12</sup> Most recently, the Court surprisingly rejected the opportunity to use the Elections Clause to kill independent commission-based congressional redistricting and other electoral reforms,<sup>13</sup> and it upheld against First Amendment challenge a rule barring judicial candidates from personally soliciting campaign contributions.<sup>14</sup>

In this Essay, I describe the path of election law jurisprudence in the Roberts Court and then consider two questions. First, why has the Court, while shifting in a strongly conservative direction, not moved more extremely to the right?<sup>15</sup> Second, what options has the Court left election reformers who are unhappy with the strongly conservative, although not maximally conservative, status quo?<sup>16</sup>

On the first question, a combination of factors appears to explain the trajectory and speed of the Roberts Court's election law decisions. The Roberts Court, with its five-Justice bloc of Chief Justice John Roberts and Justices Samuel Alito, Anthony Kennedy, Antonin Scalia, and Clarence Thomas, was fundamentally conservative, but for jurisprudential, temperamental, or strategic reasons, the Justices holding the balance of power appeared to prefer incrementalism to radical change. Mandatory appellate jurisdiction appeared the best way to force the Roberts Court's hand, and it often, but not always, led to a conservative result. Nearly half of the Roberts Court's election cases came on mandatory jurisdiction.<sup>17</sup> Progressives meanwhile limited the number of cases they presented for the Court's review to avoid adverse precedent.<sup>18</sup> Finally, the five conservative Justices were not monolithic in their views and were capable of surprise, as evidenced by a recent Arizona redistricting decision, in which Justice Kennedy joined with the Court's liberals,<sup>19</sup> and a recent judicial elections case, in which Chief Justice Roberts joined with the Court's liberals.<sup>20</sup>

---

12. See *infra* Part I.B.

13. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2659 (2015).

14. *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1662 (2015); see *infra* Part I.D.

15. See *infra* Part II.

16. See *infra* Part III.

17. See *infra* Appendix.

18. Richard L. Hasen, *The Supreme Court's Shrinking Election Law Docket, 2001-2010: A Legacy of Bush v. Gore or Fear of the Roberts Court?*, 10 ELECTION L.J. 325, 326 (2011).

19. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015).

20. *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656 (2015).

On the second question, the Court has left very limited space for reform in certain areas, such as campaign finance. Where the Court has greatly constrained choice, only minor improvements are possible absent a change in the Supreme Court's personnel. In these areas, the problem is not that reformers have a "romanticized" vision of democracy; it is that the structural impediments erected by the Court have hobbled meaningful reform efforts. In contrast, in areas where the Court has mostly left room for decentralized election law approaches, such as in the arena of election administration, election fights are becoming both legal and political. Polarization and decentralization have led to the emergence of "red state election law" and "blue state election law," with voting restrictions increasingly enacted in many Republican-leaning states but not Democratic-leaning states or states with mixed control.

Part I briefly describes the path of election law in the Roberts era across key election law areas including campaign finance, voting rights, and election administration. Part II explains why the Roberts Court was deeply conservative but not consistently maximalist. Part III considers the space for election reform in the Roberts Court era and beyond.

## **I. The Roberts Court's Election Law Path**

The Supreme Court moved far to the right in key election law areas from 2005, when Chief Justice Roberts joined,<sup>21</sup> and more significantly, from 2006, when Justice Samuel Alito replaced former swing Justice Sandra Day O'Connor,<sup>22</sup> until Justice Scalia's death in 2016. Indeed, the Court's decisions in the campaign finance case of *Citizens United*<sup>23</sup> and the Voting Rights Act case of *Shelby County*<sup>24</sup> are among the most prominent and controversial decisions of the first decade of the Roberts Court across all areas of law, not just election law.<sup>25</sup> Nonetheless, the Court during this period notably turned down

---

21. Chief Justice Roberts took his judicial oath on September 29, 2005. *Members of the Supreme Court of the United States*, SUP. CT. U.S., [http://www.supremecourt.gov/about/members\\_text.aspx](http://www.supremecourt.gov/about/members_text.aspx) (last visited June 6, 2016).

22. Justice Alito took his judicial oath on January 31, 2006, and Justice O'Connor's retirement was effective the same day. *Id.*

23. *Citizens United v. FEC*, 558 U.S. 310 (2010).

24. *Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013).

25. See Constitutional Accountability Ctr., Roberts at 10: A Look at the First Decade of John Roberts's Tenure as Chief Justice 5 (2015), <http://theconstitution.org/sites/default/files/briefs/Roberts-at-10-A-Look-at-the-First-Decade.pdf> (noting *Citizens United* and *Shelby County* as two examples of how Chief Justice Roberts has "voted to move the law to the right"). The Center also provided its own overview of the Roberts Court's first decade in the area of campaign finance and voting rights. See David H. Gans, Constitutional Accountability Ctr., Roberts at 10: Campaign Finance and Voting

*footnote continued on next page*

opportunities to move election law jurisprudence even further to the right, and in a few recent cases the Court has reached what most observers consider to be more liberal results.

This Part describes the Roberts Court's election law jurisprudence through the death of Justice Scalia, including the thirty election law cases with a written opinion from 2006 to 2015,<sup>26</sup> with mention of the three additional cases decided in the October 2015 Supreme Court Term.<sup>27</sup>

#### A. Campaign Finance

Before John Roberts replaced Chief Justice William Rehnquist and Samuel Alito replaced Justice Sandra Day O'Connor, the Supreme Court went through its period of greatest deference to campaign finance regulation, as illustrated by four cases I dubbed the "New Deference Quartet."<sup>28</sup> The Court in *Shrink Missouri* upheld extremely low Missouri campaign finance limits,<sup>29</sup> enunciating a standard making it quite easy for courts to reject First Amendment challenges to campaign finance laws.<sup>30</sup> It upheld limits on political party contributions to candidates in *Colorado II*.<sup>31</sup> It rejected a challenge to the total ban on corporate contributions to candidates in *FEC v. Beaumont*.<sup>32</sup> Perhaps most significantly, the Court in *McConnell v. FEC* upheld the key provisions of the Bipartisan Campaign Reform Act<sup>33</sup> (BCRA or McCain-Feingold), including provisions barring corporations and labor unions from spending non-PAC treasury funds on "issue ads" in federal elections<sup>34</sup> and barring political parties from collecting unlimited "soft money."<sup>35</sup>

---

Rights (2015), <http://theusconstitution.org/sites/default/files/briefs/Roberts-at-10-Easier-to-Donate-Harder-to-Vote.pdf>.

26. The list of cases appears in the Appendix. The first case listed, *Wisconsin Right to Life, Inc. v. FEC*, 546 U.S. 410 (2006) (per curiam), was decided after Chief Justice Roberts joined the Court but before Justice Alito replaced Justice O'Connor.

27. See *Wittman v. Personhuballah*, 136 S. Ct. 1732 (2016); *Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S. Ct. 1301 (2016); *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016).

28. Richard L. Hasen, *Rethinking the Unconstitutionality of Contribution and Expenditure Limits in Ballot Measure Campaigns*, 78 S. CAL. L. REV. 885, 891 (2005); see also Richard L. Hasen, *Buckley Is Dead, Long Live Buckley: The New Campaign Finance Incoherence of McConnell v. Federal Election Commission*, 153 U. PA. L. REV. 31, 42-46 (2004).

29. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 382, 384-85 (2000).

30. Richard L. Hasen, *Shrink Missouri, Campaign Finance, and "The Thing That Wouldn't Leave,"* 17 CONST. COMMENT. 483, 484 (2000).

31. *FEC v. Colo. Republican Fed. Campaign Comm. (Colorado II)*, 533 U.S. 431, 437 (2001).

32. 539 U.S. 146, 149 (2003).

33. Pub. L. No. 107-155, 116 Stat. 81 (2002) (codified in scattered sections of 2, 18, 28, 36, and 47 U.S.C.).

34. 540 U.S. 93, 190, 194, 206 (2003).

35. *Id.* at 156.

The campaign finance landscape changed dramatically with the emergence of the Roberts Court, turning a Court that usually voted in favor of campaign limits by a 5-4 vote into one usually voting against such limits by a 5-4 vote. The move toward deregulation began rather slowly, with the Court first punting on an as-applied challenge to McCain-Feingold in *Wisconsin Right to Life, Inc. v. FEC* (WRTL I)<sup>36</sup> and issuing a fractured decision in *Randall v. Sorrell*, striking down Vermont's very low campaign contribution limits as a First Amendment violation.<sup>37</sup> *Randall* has not led to a flood of contribution limits being struck down as unconstitutionally low,<sup>38</sup> showing the limited reach of its decision.

Things then shifted dramatically. In *FEC v. Wisconsin Right to Life, Inc.* (WRTL II), Chief Justice Roberts, joined by Justice Alito, wrote a controlling opinion that undermined the corporate and union campaign spending limits of McCain-Feingold through a strict interpretation of the statute,<sup>39</sup> in a move Justice Scalia called "faux judicial restraint" because it failed to straightforwardly hold the statute unconstitutional.<sup>40</sup> Within two years, however, the restraint was gone, and the Court in a 5-4 opinion in *Citizens United* simply struck that portion of McCain-Feingold as a First Amendment violation.<sup>41</sup> In the process, the Court overruled both *Austin v. Michigan State Chamber of Commerce*, a 1990 case that had upheld corporate and labor union spending limits dating back to the 1940s,<sup>42</sup> and that part of *McConnell* upholding BCRA's limits on corporate and union "issue advocacy" spending.<sup>43</sup> The *Citizens United* opinion spawned follow-on lawsuits and FEC proceedings,<sup>44</sup> which prompted the growth of "Super PACs," groups nominally

---

36. 546 U.S. 410, 412 (2006) (per curiam).

37. 548 U.S. 230, 236 (2006) (plurality opinion); *id.* at 264 (Kennedy, J., concurring in the judgment); *id.* at 265 (Thomas, J., concurring in the judgment).

38. *See, e.g.*, *Thalheimer v. City of San Diego*, 706 F. Supp. 2d 1065, 1072, 1074 (S.D. Cal. 2010) (denying preliminary injunction in a case challenging the city's \$500 individual contribution limit). As a matter of disclosure, I was one of the attorneys representing the City of San Diego in this challenge.

39. *FEC v. Wis. Right to Life, Inc.* (WRTL II), 551 U.S. 449, 469-70 (2007) (plurality opinion).

40. *Id.* at 499 n.7 (Scalia, J., concurring in part and concurring in the judgment); *see also* Richard L. Hasen, *Beyond Incoherence: The Roberts Court's Deregulatory Turn in FEC v. Wisconsin Right to Life*, 92 MINN. L. REV. 1064, 1065-66 (2008) (discussing WRTL opinions).

41. *Citizens United v. FEC*, 558 U.S. 310, 318-19, 365 (2010).

42. 494 U.S. 652, 654-55 (1990); HASEN, *supra* note 2, at 18.

43. *Citizens United*, 558 U.S. at 318-19, 365.

44. *See, e.g.*, *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc); Matthew S. Petersen, Fed. Election Comm'n, Advisory Opinion 2010-09, at 3 (2010), <http://saos.nictusa.com/aodocs/AO%202010-09.pdf>; Matthew S. Petersen, Fed. Election Comm'n, Advisory Opinion 2010-11, at 3 (2010), <http://saos.nictusa.com/aodocs>

*footnote continued on next page*



independent of candidates but cooperating to the fullest extent allowed by law and perhaps beyond and funded with huge contributions from billionaires and others.<sup>45</sup>

The Court has done more to deregulate the campaign finance system. In *Davis v. FEC*, it struck down another McCain-Feingold provision that allowed candidates running against wealthy individuals who are self-funding to receive increased contributions.<sup>46</sup> Similarly, in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, the Court struck down Arizona's public financing program that provided extra matching funds for candidates running against wealthy individuals or large outside spending.<sup>47</sup> In both cases, the Court held that the law violated the First Amendment because it was motivated by an attempt to level the playing field—an interest in political equality the Court rejected in both *Buckley v. Valeo*<sup>48</sup> and *Citizens United*.<sup>49</sup> Arizona marked the first time the Court applied strict scrutiny to judge a public financing provision in a campaign finance law.<sup>50</sup>

Most recently, in *McCutcheon v. FEC*, the Court struck down an aggregate (or total) limit on the amount that an individual could contribute to federal candidates, parties, and committees in a two-year period.<sup>51</sup> In the course of so holding, the Court made it easier to bring challenges to other campaign contribution limits, with the Chief Justice seeming to lay the groundwork for a renewed challenge to McCain-Feingold's soft money rules.<sup>52</sup>

Despite these rulings, which have significantly deregulated the campaign finance system, the Court did not go as far as it had been asked to go. In both *Doe v. Reed* and *Citizens United*, the Court rejected broad challenges to campaign disclosure rules.<sup>53</sup> A Court majority endorsed disclosure as a more narrowly tailored way of dealing with the risk of corruption, as well as a means of

---

/AO%202010-11.pdf; see also HASEN, *supra* note 2, at 33-34 (recounting developments after *Citizens United*).

45. See HASEN, *supra* note 2, at 33-34.

46. 554 U.S. 724, 729, 744 (2008).

47. 131 S. Ct. 2806, 2813 (2011).

48. 424 U.S. 1, 48-49 (1976) (per curiam).

49. 558 U.S. 310, 349-50 (2010) (citing *Buckley*, 424 U.S. at 48-49).

50. See *Ariz. Free Enter.*, 131 S. Ct. at 2817. The only other Supreme Court case considering the constitutionality of a public financing plan was *Buckley*, in which the Court did not apply strict scrutiny. 424 U.S. at 95-96 (per curiam) (testing constitutionality of public financing plan against a "sufficiently important government interests" standard).

51. 134 S. Ct. 1434, 1442 (2014) (plurality opinion).

52. See HASEN, *supra* note 2, at 35-36; see also *infra* notes 171-76 and accompanying text (noting new soft money challenges).

53. *Doe v. Reed*, 561 U.S. 186, 191 (2010) (rejecting, on an 8-1 vote, a facial challenge to a Washington law requiring public disclosure of names of persons signing a referendum petition); *Citizens United*, 558 U.S. at 371 (rejecting, on an 8-1 vote, a challenge to various disclosure provisions of BCRA).

providing information to voters. Only Justice Thomas and, to some extent, Justice Alito have resisted the reliance on disclosure,<sup>54</sup> although the Court's liberals see disclosure as a supplement to, not a substitute for, campaign limits.

The Court twice turned away<sup>55</sup> attempts to overrule *FEC v. Beaumont*, a pre-Roberts Court case upholding the federal ban on corporate contributions to candidates.<sup>56</sup> Challengers had argued with some force that the logic of at least the *Austin*-based rationale used in *Beaumont* had been undermined by *Citizens United* and other cases.<sup>57</sup> The Court also turned away an attempt to circumvent *McConnell*'s upholding of McCain-Feingold's soft money ban, with three Justices (Kennedy, Scalia, and Thomas) voting to hear the case.<sup>58</sup> It also sidestepped Senator McConnell's argument in the *McCutcheon* case to apply strict scrutiny to review the constitutionality of campaign contribution limits.<sup>59</sup> Contribution limits under *McCutcheon* continue to get lesser "exacting scrutiny" review,<sup>60</sup> although the Court in *McCutcheon* redefined such scrutiny to be more rigorous than before.<sup>61</sup>

---

54. See *Citizens United*, 558 U.S. at 480-85 (Thomas, J., concurring in part and dissenting in part) (dissenting on disclosure issues); *Doe*, 561 U.S. at 212 (Alito, J., concurring) ("In this case—both through analogy and through their own experiences—plaintiffs have a strong case that they are entitled to as-applied relief, and they will be able to pursue such relief before the District Court.").

55. See *Iowa Right to Life Comm., Inc. v. Tooker*, 717 F.3d 576 (8th Cir. 2013), *cert. denied*, 134 S. Ct. 1787 (2014); *United States v. Danielczyk*, 683 F.3d 611 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 1459 (2013).

56. 539 U.S. 146, 149 (2003).

57. See *Minn. Concerned Citizens for Life, Inc. v. Swanson*, 692 F.3d 864, 879 n.12 (8th Cir. 2012) (en banc) (stating that *Beaumont*'s "precedential value is on shaky ground").

58. *Republican Nat'l Comm. v. FEC*, 698 F. Supp. 2d 150 (D.D.C.), *aff'd*, 561 U.S. 1040 (2010). The case raised an as-applied challenge to the soft money provisions of BCRA and did not ask for the soft money part of *McConnell* to be formally overruled. *Id.* at 153. Justices Kennedy, Scalia, and Thomas stated that they would have noted probable jurisdiction and set the case for oral argument. *Republican Nat'l Comm.*, 561 U.S. at 1040; see also *In re Cao*, 619 F.3d 410, 414 (5th Cir. 2010) (rejecting certain challenges to BCRA political party limitations), *cert. denied sub nom. Cao v. FEC*, 131 S. Ct. 1718 (2011).

59. Brief of Senator Mitch McConnell as *Amicus Curiae* Supporting Appellants at 4, *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014) (No. 12-536), 2013 WL 2102849 (arguing for strict scrutiny review of contribution limits).

60. *McCutcheon*, 134 S. Ct. at 1444-46 (declining to consider whether to apply strict scrutiny to review of contribution limits).

61. See HASEN, *supra* note 2, at 35-36; Richard L. Hasen, *Die Another Day*, SLATE (Apr. 2, 2014, 1:13 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2014/04/the\\_subtle\\_awfulness\\_of\\_the\\_mccutcheon\\_v\\_fec\\_campaign\\_finance\\_decision\\_the.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2014/04/the_subtle_awfulness_of_the_mccutcheon_v_fec_campaign_finance_decision_the.html).

## B. Voting Rights Act

Without a doubt, the Roberts Court's most significant voting rights opinion is its 2013 decision in *Shelby County v. Holder*<sup>62</sup> striking down the Voting Rights Act's preclearance regime under which Congress required jurisdictions with a history of racial discrimination in voting to get federal approval before making changes in their voting rules and procedures.<sup>63</sup> Before *Shelby County*, the Supreme Court since the 1960s had upheld preclearance three times as an appropriate exercise of congressional power given the history of racial discrimination in voting in the covered jurisdictions.<sup>64</sup> In a 2009 Roberts Court case, *Northwest Austin Municipality Utility District Number One v. Holder* (*NAMUDNO*), the Court strongly hinted that the preclearance regime was no longer constitutional because the coverage formula contained in section 4 of the Act was not based upon evidence of current intentional discrimination by covered states.<sup>65</sup> *Shelby County* piggybacked on *NAMUDNO* to strike section 4's coverage formula as exceeding congressional power, rendering section 5 inoperable unless Congress enacted a new (and constitutional) coverage formula.<sup>66</sup>

*Shelby County* had an immediate impact on politics in previously covered jurisdictions. Texas put into action its very strict voter identification law, which had been blocked by both the U.S. Department of Justice and a three-judge federal court in Washington, D.C. under the preclearance provisions.<sup>67</sup> North Carolina, partially covered by the Act, passed what appears to be the largest set of voting restrictions in a single law since the passage of the 1965 Voting Rights Act.<sup>68</sup> Both Texas and North Carolina's voting changes are currently the subject of litigation under the Constitution and section 2 of the Voting Rights Act.<sup>69</sup>

---

62. 133 S. Ct. 2612 (2013).

63. Technically speaking, the Court struck down the section 4 coverage formula, which rendered section 5 inoperable unless and until Congress enacts a new (and constitutional) coverage formula. For an explanation of why this was a kind of false minimalism, see Richard L. Hasen, *Shelby County and the Illusion of Minimalism*, 22 WM. & MARY BILL RIGHTS J. 713, 713-14 (2014).

64. See *Lopez v. Monterey Cty.*, 525 U.S. 266, 282, 284-85 (1999); *City of Rome v. United States*, 446 U.S. 156, 187 (1980); *South Carolina v. Katzenbach*, 383 U.S. 301, 308, 314 (1966).

65. 557 U.S. 193, 204 (2009).

66. *Shelby Cty.*, 133 S. Ct. at 2631.

67. *Texas v. Holder*, 888 F. Supp. 2d 113, 114-15 (D.D.C. 2012), *vacated and remanded*, 133 S. Ct. 2886 (2013).

68. Hasen, *supra* note 7, at 60-61.

69. See *Veasey v. Perry*, 71 F. Supp. 3d 627, 707 (S.D. Tex.) (granting injunction), *stayed*, 769 F.3d 890 (5th Cir.), *motion to vacate stay denied*, 135 S. Ct. 9 (2014); N.C. State Conference of the NAACP v. McCrory, No. 1:13cv658, 2016 WL 1650774, at \*1 (M.D.N.C. Apr. 25, 2016), *appeal filed sub nom. United States v. North Carolina*, No. 16-1529 (4th Cir. May 9,

*footnote continued on next page*

*Shelby County* was an audacious 5-4 opinion that provoked a strong dissent from Justice Ginsburg for the four dissenters,<sup>70</sup> but it was not the only case limiting the protections of the Voting Rights Act. In *Bartlett v. Strickland*, the Court rejected arguments from voting rights advocates to read section 2 of the Act to mandate the drawing of minority voter crossover districts.<sup>71</sup> Further, in *League of United Latin American Citizens v. Perry* (*LULAC*), the Court appeared to change the standards for drawing minority-opportunity districts under section 2 of the Voting Rights Act.<sup>72</sup> Under *LULAC*, it is not enough for minority plaintiffs to show that one can draw a district with enough minority voters so that they may elect a representative of their choice; it is also necessary to show that minority voters who would be put in a district have enough in common on a socioeconomic basis that it makes sense to group these voters together.<sup>73</sup> While this cultural compactness holding helped minority plaintiffs in *LULAC* by reversing a Texas Republican gerrymander, it is not clear that this standard will help minority voters generally in section 2 lawsuits. Under this rule, jurisdictions cannot be compelled to create minority opportunity districts when the minority voters who would be in them have disparate socioeconomic backgrounds.

The Supreme Court also let Texas continue to use its controversial voter identification law in the 2014 elections, even though the trial court found that the state enacted the law with a racially discriminatory intent and that the law caused a racially discriminatory effect in violation of both the Constitution and section 2 of the Voting Rights Act.<sup>74</sup> However, the Court may have been reacting more to the timing of the case—with the district court judge changing the rules just before the 2014 early voting period was about to start and after

---

2016); Richard L. Hasen, *The Voting Wars Heat Up*, SLATE (Sept. 29, 2014, 10:30 AM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2014/09/voting\\_restrictions\\_may\\_reach\\_the\\_supreme\\_court\\_from\\_ohio\\_wisconsin\\_north.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2014/09/voting_restrictions_may_reach_the_supreme_court_from_ohio_wisconsin_north.html); see also Press Release, U.S. Dep't of Justice, Justice Department to File Lawsuit Against the State of North Carolina to Stop Discriminatory Changes to Voting Law (Sept. 30, 2013), <http://www.justice.gov/opa/pr/justice-department-file-lawsuit-against-state-north-carolina-stop-discriminatory-changes>; Press Release, U.S. Dep't of Justice, Justice Department to File New Lawsuit Against State of Texas over Voter I.D. Law (Aug. 22, 2013), <http://www.justice.gov/opa/pr/justice-department-file-new-lawsuit-against-state-texas-over-voter-id-law>.

70. See 133 S. Ct. at 2632-52 (Ginsburg, J., dissenting).

71. 556 U.S. 1, 23 (2009) (plurality opinion).

72. 548 U.S. 399, 441-42 (2006) (holding that Texas could not maintain compliance with section 2 of the Voting Rights Act after breaking up a Latino opportunity district "by creating an entirely new district that combined two groups of Latinos, hundreds of miles apart, that represent different communities of interest").

73. See *id.* at 424-25, 432-34, 441-42.

74. *Veasey*, 71 F. Supp. 3d at 702-03.

Texas had already implemented its voter identification law in elections—than to the merits of the case.<sup>75</sup>

As in the campaign finance area, the Roberts Court's voting rights decisions show a sharp turn to the right, but its decisions could have been more extreme. The Court refused to entertain arguments that section 2 of the Voting Rights Act was unconstitutional, preferring instead to adopt narrower interpretations of the Act that avoided the constitutional questions.<sup>76</sup> It denied certiorari in a case challenging the creation of majority-minority districts under the California Voting Rights Act, a challenge that, if successful, could have called into question the constitutionality of section 2.<sup>77</sup> The Court also declined to hear a section 2 challenge to Wisconsin's voter identification law, despite the fact that the court of appeals divided 5-5 on the key issues in the case and the influential Judge Richard Posner wrote an impassioned dissent from the refusal of the Seventh Circuit to rehear an emergency appeal in the case.<sup>78</sup> Given the Supreme Court's conservative orientation, if it had heard the case it could very well have affirmed the Seventh Circuit's holding that Wisconsin's restrictive voter identification law did not violate section 2 and extended a narrow reading of section 2 nationwide.

Further, in last Term's *Alabama Legislative Black Caucus v. Alabama* case, Justice Kennedy joined with the four liberal Justices on the Court in allowing minority plaintiffs to raise a "racial gerrymandering" claim to defeat a Republican attempt to pack black Democrats into fewer districts.<sup>79</sup> The cause of action before the Supreme Court was not one for vote dilution. Instead, it

---

75. For an analysis of the Court's decision to allow the voter ID law to remain in place and of Justice Ginsburg's dissent, see Richard L. Hasen, *Reining in the Purcell Principle*, FLA. ST. U. L. REV. (forthcoming June 2016), [http://papers.ssrn.com/abstract\\_id=2545676](http://papers.ssrn.com/abstract_id=2545676).

76. See, e.g., *Nw. Austin Mun. Util. Dist. No. One (NAMUDNO) v. Holder*, 557 U.S. 193, 197 (2009) (engaging in a contorted act of statutory interpretation to avoid the question of the Voting Rights Act's constitutionality); *Bartlett*, 556 U.S. at 21 (plurality opinion) (adopting a narrow interpretation of section 2 of the Voting Rights Act to avoid serious constitutional question with scope of statute); *LULAC*, 548 U.S. at 445-46 (plurality opinion) (same). *Bartlett* was a plurality opinion rather than a majority opinion because Justices Scalia and Thomas took the position that section 2 does not allow any vote dilution claims. See *Bartlett*, 556 U.S. at 26 (Thomas, J., concurring in the judgment); see also *LULAC*, 548 U.S. at 512 (Scalia, J., concurring in the judgment in part and dissenting in part) (rejecting, joined by Justice Thomas, application of section 2 to vote dilution claims).

77. *Sanchez v. City of Modesto*, 51 Cal. Rptr. 3d 821, 825-26 (Ct. App. 2006), *cert. denied*, 552 U.S. 974 (2007).

78. *Frank v. Walker*, 17 F. Supp. 3d 837, 863, 879 (E.D. Wis.) (holding that Wisconsin's voter identification law violated section 2 of the Voting Rights Act and the U.S. Constitution's Equal Protection Clause and enjoining the law's use in elections), *rev'd*, 768 F.3d 744 (7th Cir.), *reh'g en banc denied by an equally divided court*, 773 F.3d 783 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 1551 (2015); see also *Frank*, 773 F.3d at 783 (Posner, J., dissenting from denial of rehearing en banc).

79. 135 S. Ct. 1257, 1274 (2015).

was a racial gerrymandering claim alleging an unconstitutional use of race as the “predominant” factor in redistricting.<sup>80</sup> This claim had been used in the 1990s to attack the creation of minority opportunity districts but was now being used by Democrats and minority plaintiffs.<sup>81</sup> The case should moderately improve the chances for challenging some Republican gerrymanders.<sup>82</sup>

### C. Election Administration

The Roberts Court issued two opinions related to voter identification laws: *Purcell v. Gonzalez*<sup>83</sup> and *Crawford v. Marion County Election Board*.<sup>84</sup> In *Purcell*, the Court allowed Arizona to use its new voter identification law while a case against its legality was pending in federal district court.<sup>85</sup> The Court reversed a Ninth Circuit stay in a short and somewhat inscrutable per curiam opinion that has come to stand for the principle that courts should not impose emergency orders in the period just before an election.<sup>86</sup> In the course of discussion, however, the Court indicated (without providing empirical support) that voter identification laws can promote public confidence and ensure that turnout will not decline due to fears of illegal votes diluting legal ones.<sup>87</sup>

The Court took a deeper look at voter identification laws in the 2008 *Crawford* case challenging Indiana’s new law, which at the time was one of the strictest in the nation. On a 6-3 vote, the Court rejected a facial challenge to the law, finding that most voters would not be burdened by the requirement and that the potential for preventing voter fraud and promoting public confidence was enough of a reason to justify the requirement,<sup>88</sup> even absent proof of a major problem with impersonation fraud. The six Justices in the majority divided into distinct groups, however. Chief Justice Roberts and Justices Stevens and Kennedy left the door open for as-applied challenges as to those

---

80. *Id.* at 1262.

81. See Richard L. Hasen, *Racial Gerrymandering’s Questionable Revival*, 67 ALA. L. REV. 365, 365-66, 367-78 (2015) (describing evolution of racial gerrymandering cause of action).

82. For a critical look, see *id.* at 384.

83. 549 U.S. 1 (2006) (per curiam).

84. 553 U.S. 181 (2008).

85. 549 U.S. at 5-6 (per curiam).

86. See *id.* at 3, 5.

87. *Id.* at 4. For more on the timing question, see Hasen, *supra* note 75 (manuscript at 14-18). For a critique of the *Purcell* analysis, see Richard L. Hasen, *The Untimely Death of Bush v. Gore*, 60 STAN. L. REV. 1, 35-36 (2007). See also Stephen Ansolabehere & Nathaniel Persily, *Vote Fraud in the Eye of the Beholder: The Role of Public Opinion in the Challenge to Voter Identification Requirements*, 121 HARV. L. REV. 1737, 1750-51 (2008) (finding that voter confidence in the electoral process is not correlated with the presence or absence of a voter identification law in the state).

88. *Crawford*, 553 U.S. at 191, 197, 200-02 (plurality opinion).

voters facing serious impediments in securing a form of voter identification the state accepted as adequate,<sup>89</sup> while Justices Alito, Scalia, and Thomas believed the law was valid as applied to all voters in the state, even against those for whom the law would be a major burden.<sup>90</sup>

In the wake of the *Crawford* ruling, an increasing number of states—all with Republican-dominated legislatures—enacted new voter identification laws even stricter than the one upheld in *Crawford*.<sup>91</sup> With the constitutional claims mostly foreclosed by *Crawford*, challengers raised new arguments under state constitutions and section 2 of the Voting Rights Act. Both sets of arguments initially had some success, and the section 2 claims have been litigated in a few cases.<sup>92</sup> As noted in Part I.B, the Court passed over its first opportunity, out of Wisconsin, to consider the scope of section 2 in this context.<sup>93</sup> Earlier, however, the Court put the Wisconsin law on hold for the 2014 election, given strong arguments that there was not enough time for Wisconsin officials to put the new identification requirement into effect without disenfranchising many Wisconsin voters. It was the mirror image of the situation in Texas, where the Court let the voter identification law already in place stay in place.<sup>94</sup>

The Court also mostly punted on other significant election law administration cases that came before it. In 2008, it rejected a challenge by the Ohio Republican Party to the Ohio Secretary of State's refusal to match voter registration information with the state's motor vehicle database.<sup>95</sup> The Ohio Republican Party argued that the requirement was set forth by the Help America Vote Act of 2002 (HAVA),<sup>96</sup> but the Court in a per curiam opinion determined that the party likely did not have standing to raise a HAVA violation claim.<sup>97</sup>

---

89. *Id.* at 202-03.

90. *Id.* at 204 (Scalia, J., concurring in the judgment). Justin Levitt contrasts the two approaches as the difference between an on/off light switch and a dimmer switch. Justin Levitt, *Crawford—More Rhetorical Bark than Legal Bite?*, BRENNAN CTR. FOR JUST. (May 2, 2008), [http://www.brennancenter.org/blog/archives/crawford\\_more\\_rhetorical\\_bark\\_than\\_legal\\_bite](http://www.brennancenter.org/blog/archives/crawford_more_rhetorical_bark_than_legal_bite).

91. See Richard L. Hasen, *The 2012 Voting Wars, Judicial Backstops, and the Resurrection of Bush v. Gore*, 81 GEO. WASH. L. REV. 1865, 1872 (2013).

92. For a look at how courts have decided, and should decide, such challenges, see Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 HARV. C.R.-C.L. L. REV. 439, 473-89 (2015). See generally Hasen, *supra* note 91 (describing election administration litigation in the 2012 election cycle).

93. See *supra* Part I.B.

94. See *supra* notes 74, 78 and accompanying text.

95. *Brunner v. Ohio Republican Party*, 555 U.S. 5, 5-6 (2008) (per curiam).

96. Pub. L. No. 107-252, 116 Stat. 1666 (codified as amended at 42 U.S.C. §§ 15301-545 (2014)).

97. *Brunner*, 555 U.S. at 5-6 (per curiam).

The Court refused to intervene in a 2012 election case from Ohio in which a federal district court and the Sixth Circuit reversed Ohio's modest cutback in early voting.<sup>98</sup> These lower courts had adopted a very pro-plaintiff reading of the Equal Protection Clause and one that the Court would have been unlikely to adopt should it have reached the issue.<sup>99</sup> In the 2014 election, the lower courts again stopped a legislative rollback of Ohio's early voting schedule, but this time the Supreme Court reversed the Sixth Circuit and allowed Ohio's rollback without comment.<sup>100</sup>

#### D. Other Cases

Although campaign finance, voting rights, and election administration disputes made up the bulk of the Roberts Court's election law cases, the Court also decided other cases on issues including judicial elections, political party primaries, and redistricting.

Two of the most notable election law cases in the "other" category both involved judicial elections, and both reached results in which four conservative Justices dissented. In *Caperton v. A.T. Massey Coal Co.*, Justice Kennedy wrote an opinion joined by the four liberals in holding that under the Due Process Clause, a West Virginia Supreme Court justice had to recuse himself from considering a case involving a person who had contributed \$3 million to an independent group supporting that justice's election to office.<sup>101</sup> The opinion's understanding of the role independent spending can play in elections and at least the appearance of undue influence over the elected official who benefited from the spending was in considerable tension with the role of money Justice Kennedy later described in *Citizens United*. In *Citizens United*, the Court rejected the idea that the use of campaign money independent of candidates could be limited to prevent anyone from having disproportionate influence, while in *Caperton*, the Court held that the large contributions to an

---

98. *Obama for Am. v. Husted*, 888 F. Supp. 2d 897, 899 (S.D. Ohio), *aff'd*, 697 F.3d 423 (6th Cir.), *stay denied*, 133 S. Ct. 497 (2012).

99. See Hasen, *supra* note 91, at 1880-87 (describing litigation and critiquing lower court jurisprudential theories); Adam Liptak, *Justices Clear the Way for Early Voting in Ohio*, N.Y. TIMES (Oct. 16, 2012), <http://nyti.ms/R300eX>.

100. *Ohio State Conference of the NAACP v. Husted*, 43 F. Supp. 3d 808, 852-53 (S.D. Ohio) (granting preliminary injunction), *aff'd*, 768 F.3d 524 (6th Cir.), *stay granted*, 135 S. Ct. 42 (2014). The case then settled, but new plaintiffs have filed suit challenging the rollback and other election law changes. Darrel Rowland, *Federal Lawsuit Filed Against Ohio's Voting System*, COLUMBUS DISPATCH (May 11, 2015, 7:30 PM), <http://www.dispatch.com/content/stories/local/2015/05/11/0511-hillary-lawsuit.html>.

101. 556 U.S. 868, 872 (2009).



independent group benefitting a justice created disproportionate influence over the justice and merited recusal.<sup>102</sup>

In *Williams-Yulee v. Florida Bar*, Chief Justice Roberts wrote an opinion joined by the four liberals that rejected a First Amendment challenge to a Florida judicial canon barring judicial candidates from personally soliciting campaign contributions.<sup>103</sup> Although the Court applied strict scrutiny to the provision, it held that the law survived. Chief Justice Roberts notably explained that “narrow[] tailor[ing]” did not require “perfect[] tailor[ing],” even under strict scrutiny.<sup>104</sup> This opinion, too, was in considerable tension with the Court’s approach to campaign restrictions in *Citizens United* as well as with a pre-Roberts case, *Republican Party of Minnesota v. White*, which seemed to reject special speech rules for judicial elections as inconsistent with the First Amendment.<sup>105</sup> In *Caperton*, Chief Justice Roberts wrote a bitter dissent;<sup>106</sup> in *Williams-Yulee*, Justice Kennedy wrote a strong dissent.<sup>107</sup> The rest of the Justices were consistent. The four liberals voted with the majority in both cases, and the three remaining conservatives dissented.

The Roberts Court decided another case involving judicial elections, *New York State Board of Elections v. Lopez Torres*, rejecting a challenge to New York’s byzantine system for nominating judicial candidates in partisan primaries.<sup>108</sup> A successful challenge could have made those elections more competitive, but the Court rejected the idea that voters possess a right to competitive elections.<sup>109</sup>

---

102. For a critique and comparison of the two cases, see Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 611-15 (2011).

103. 135 S. Ct. 1656, 1672 (2015).

104. *Id.* at 1671 (quoting *Burson v. Freeman*, 504 U.S. 191, 209 (1992) (plurality opinion)).

105. *White*, 536 U.S. 765, 788 (2002).

106. See 556 U.S. at 890 (Roberts, C.J., dissenting).

107. See 135 S. Ct. at 1682 (Kennedy, J., dissenting).

108. 552 U.S. 196, 209 (2008).

109. Consider the Court’s statement in *Lopez Torres*:

The reason one-party rule is entrenched may be (and usually is) that voters approve of the positions and candidates that the party regularly puts forward. It is no function of the First Amendment to require revision of those positions or candidates. The States can, within limits (that is, short of violating the parties’ freedom of association), discourage party monopoly—for example, by refusing to show party endorsement on the election ballot. But the Constitution provides no authority for federal courts to prescribe such a course. The First Amendment creates an open marketplace where ideas, most especially political ideas, may compete without government interference. It does not call on the federal courts to manage the market by preventing too many buyers from settling upon a single product.

*Id.* at 208 (citation omitted). This statement is fairly seen as a rejection of the “politics as markets” approach of Samuel Issacharoff and Richard Pildes, which calls upon courts to decide election law cases by promoting political competition. See Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 648 (1998). For some critiques of the structural approach, see RICHARD L. HASEN, *THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM BAKER V. CARR TO BUSH V. GORE* 138-56 (2003); Bruce E. Cain, *Garrett’s Temptation*, 85 VA.

*footnote continued on next page*

In *Washington State Grange v. Washington State Republican Party*, the Court allowed the state of Washington to use a top-two primary, which included information on the party preference of candidates on the ballot, so long as no evidence suggested that voters were confused by the ballot into thinking they were actually participating in a partisan primary.<sup>110</sup> It was a significant cutback on the pre-Roberts case of *California Democratic Party v. Jones*.<sup>111</sup> In *Jones*, the Court struck down a similar form of “blanket primary” as violating the First Amendment associational rights of the parties.<sup>112</sup> *Washington State Grange* blessed a method that Washington State had used to achieve much of what the “blanket primary” was meant to accomplish but without running into the constitutional problems the Court identified in *Jones*.

In *Tennant v. Jefferson County Commission*, the Court loosened the strict mathematical equality it had required states to use to draw congressional districts.<sup>113</sup> And, in a case decided after the ten-year period of this study, *Evenwel v. Abbott*, the Court unanimously rejected an argument that the Constitution required drawing districts with total voters rather than total population.<sup>114</sup> In *Evenwel*, the Court may have pulled back on *Tennant*, with the Court stating: “States must draw congressional districts with populations as close to perfect equality as possible.”<sup>115</sup>

As we will see,<sup>116</sup> *Evenwel* was a case heard initially by a three-judge district court, with direct appeal to the Supreme Court. In *Shapiro v. McManus*, the Court clarified the standards for determining when a federal district court must convene a three-judge court to hear a redistricting challenge.<sup>117</sup>

Finally, in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, Justice Kennedy joined with the Court’s four liberals to reject a challenge to congressional redistricting conducted with an independent

---

L. REV. 1589, 1600-03 (1999); Richard L. Hasen, *The “Political Market” Metaphor and Election Law: A Comment on Issacharoff and Pildes*, 50 STAN. L. REV. 719, 724-28 (1998); and Daniel H. Lowenstein, *The Supreme Court Has No Theory of Politics—And Be Thankful for Small Favors*, in *THE U.S. SUPREME COURT AND THE ELECTORAL PROCESS* 283, 296-301 (David K. Ryden ed., 2d ed. 2002). See generally Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649 (2002) (expressing skepticism of court intervention to promote political competition in redistricting).

110. 552 U.S. 442, 444, 458-59 (2008).

111. 530 U.S. 567 (2000).

112. *Id.* at 577.

113. 133 S. Ct. 3, 7-8 (2012) (per curiam).

114. 136 S. Ct. 1120, 1123 (2016).

115. *Id.* at 1124.

116. See *infra* Part II (discussing the role of mandatory appellate jurisdiction in Supreme Court election law docket formation).

117. 136 S. Ct. 450, 454-55 (2015) (holding that statutorily appropriate claims must be heard by a three-judge court unless frivolous).

commission pursuant to a voter initiative taking that power away from the state legislature.<sup>118</sup> The Arizona legislature argued that the Elections Clause vests only in state legislatures (subject to congressional override) the power to redistrict.<sup>119</sup> The Court, in an opinion written by Justice Ginsburg (over a strenuous dissent by Chief Justice Roberts<sup>120</sup>), read the term “Legislature” in the Elections Clause more broadly to include the lawmaking process of a state.<sup>121</sup> Had the Court sided with the dissenters, it would have doomed not only independent redistricting commissions conducting legislative redistricting, but also initiatives and state constitutional amendments concerning election rules that bypassed the state legislature to become effective.

## **II. Explaining the Conservative, but Not Maximalist, Turn**

In 2006, at the start of the Roberts Court era, I surveyed the state of election law and made predictions about what the shift from Chief Justice Rehnquist and Justice O'Connor to Chief Justice Roberts and Justice Alito would likely mean to the Court across key areas of election law. I prognosticated as follows:

Making predictions is always dangerous, and the conclusions I reach should be taken in the tentative spirit in which they are made. My best guess is that a decade from now, we may well face a set of election law rules that differ a great deal from today's rules. It may be that in 2016, individuals, corporations, and unions will be free to give as much money as they want to any candidate or group, subject to the filing of disclosure reports. The federal government's ability to protect the voting rights of minority groups that historically have been the victims of state discrimination may be curtailed by the inability of Congress to require any jurisdictions to submit their voting changes for preclearance and by an emasculated reading of Section 2 of the Voting Rights Act. The ability of states to manipulate election rules for partisan gain may present the greatest danger as the Court exits from that corner of the political thicket. For those who look to courts for the promotion of political equality, the signs are not encouraging.<sup>122</sup>

In retrospect, I was mostly on the mark, although things did not turn out quite as badly (from my perspective) as I predicted. While individuals, labor unions, and corporations are now free to give as much money as they want to independent groups, they are still limited in how much they can give directly to candidates and political parties.<sup>123</sup> While the Court indeed gutted the

---

118. 135 S. Ct. 2652, 2658, 2668 (2015).

119. *Id.* at 2659.

120. *See id.* at 2677 (Roberts, C.J., dissenting).

121. *Id.* at 2668 (majority opinion).

122. Hasen, *supra* note 9, at 687.

123. *See supra* Part I.A.

preclearance regime of section 5 of the Voting Rights Act and has read section 2 of the Act narrowly, it has not so eviscerated section 2 as to render it useless in redistricting cases.<sup>124</sup> Indeed, section 2 still requires that states and localities maintain minority opportunity districts under some conditions.<sup>125</sup> And while the Court has allowed partisan manipulation of election rules, such as the imposition of voter identification provisions for partisan gain,<sup>126</sup> it has not completely left the arena. In the area of partisan gerrymandering, for example, the Court (thanks to Justice Kennedy) continues to hold out hope for coming up with a manageable standard for judging the impermissible consideration of partisanship.<sup>127</sup> In the meantime, the Arizona redistricting case frees up states to try redistricting commissions or other measures such as state constitutional amendment to try to rein in the greatest partisan excesses.<sup>128</sup>

What explains why the conservative Roberts Court up until Justice Scalia's death issued some terrible opinions from the progressive perspective, including *Citizens United*, *McCutcheon*, *Shelby County*, and *Crawford*, but did not go even further by killing contribution limits to candidates, holding unconstitutional or killing through chary interpretation section 2 of the

---

124. See *supra* Part I.B.

125. *League of United Latin Am. Citizens (LULAC) v. Perry*, 548 U.S. 399, 425-26 (2006) (setting forth standards).

126. See *supra* Part I.C.

127. As the Court noted just this last Term in the Arizona redistricting case:

This case concerns an endeavor by Arizona voters to address the problem of partisan gerrymandering—the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power. “[P]artisan gerrymanders,” this Court has recognized, “[a]re incompatible with democratic principles.”

Even so, the Court in *Vieth* did not grant relief on the plaintiffs’ partisan gerrymander claim. The plurality held the matter nonjusticiable. Justice KENNEDY found no standard workable in that case, but left open the possibility that a suitable standard might be identified in later litigation.

*Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2658 (2015) (alterations in original) (citations omitted) (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 292 (2004) (plurality opinion)).

128. The Florida Supreme Court, relying on *Arizona*, recently rejected an Elections Clause challenge to a voter initiative as applied to congressional districts requiring the Florida legislature to avoid intentional partisan manipulation in drawing legislative districts. *League of Women Voters v. Detzner*, 172 So. 3d 363, 370 n.2 (Fla. 2015) (“We reject the Legislature’s federal constitutional challenge to the Fair Districts Amendment. The Supreme Court’s recent opinion in *Arizona* confirms that neither the ‘Elections Clause’ of the United States Constitution nor federal law prohibits the people of a state, through the citizen initiative process, from directing the way in which its congressional district boundaries are drawn. As the Supreme Court explained, ‘[b]anning lawmaking by initiative to direct a State’s method of apportioning congressional districts’ would ‘stymie attempts to curb partisan gerrymandering, by which the majority in the legislature draws district lines to their party’s advantage.’” (alteration in original) (citations omitted) (quoting *Ariz. State Legislature*, 135 S. Ct. at 2676)).

Voting Rights Act, and more? And why did it carve out special rules allowing for some regulation of judicial elections and reserve some space for continued policing (or at least exploration of means to police) partisan gerrymandering claims? There appears to be no single answer for the speed bumps and twists in the Court's sharp right turn, but based on the limited information we have—with no access to Court correspondence or to the Justices' private thoughts—three factors appear as likely explanations.

A. The Long Game?

A Justice plays the “long game” by not moving the law in his or her preferred direction immediately, but acting strategically to put his or her preferences into the law over a series of cases and years. The long game may help preserve the legitimacy of the Court by purporting to show the Court moving slowly, minimally, and in line with gradual changes in precedent.

Before the Court decided *Citizens United*, Chief Justice Roberts wrote a controlling opinion, joined by Justice Alito, in *WRTL II* that seriously undermined the McCain-Feingold campaign finance law without actually ruling the law unconstitutional.<sup>129</sup> It was this opinion, which avoided a straight-out declaration of unconstitutionality, that prompted Justice Scalia's “faux judicial restraint is judicial obfuscation” comment.<sup>130</sup> Even in the drafting of *Citizens United*, the Court did not immediately overrule *Austin* and the relevant portion of *McConnell*, which upheld corporate and labor union spending limits.<sup>131</sup> Instead, at the end of the October 2009 Term, after briefing and oral argument, the Court ordered a new round of briefing and argument on the overruling question the following September.<sup>132</sup>

Before the Court on a 5-4 vote struck down the coverage formula for the preclearance provision of the Voting Rights Act in *Shelby County*,<sup>133</sup> it issued an 8-1 decision in *NAMUDNO* raising deep constitutional doubts about whether Congress exceeded its powers in extending preclearance.<sup>134</sup>

Such actions signal that at least some of the Justices are not in a rush to overrule past precedent or at least do not want to appear to be in a rush. The reasons for waiting may be jurisprudential, temperamental, or strategic. *WRTL II* and *NAMUDNO* represent at least the appearance of judicial minimalism, of trying to decide less, and of giving political actors a chance to

---

129. 551 U.S. 449, 478-79 (2007) (plurality opinion) (adopting a very broad test for exempting corporate campaign spending from McCain-Feingold spending limitations).

130. *Id.* at 499 n.7 (Scalia, J., concurring in part and concurring in the judgment).

131. See HASEN, *supra* note 2, at 110.

132. See *id.* at 107-13 (reviewing history of *Citizens United* arguments and decision).

133. *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2631 (2013).

134. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 202-03 (2009).

respond.<sup>135</sup> Whether the Chief Justice crafted these rulings out of a genuine desire to decide less or to preserve the Court's legitimacy is difficult to say. We do know from some leaked deliberations surrounding *Citizens United* that the Court initially was prepared to overturn *Austin* and part of *McConnell* without that issue being fully briefed, and Justice Souter wrote a draft dissent blasting the Justices for deciding the issue without briefing.<sup>136</sup> The Court then ordered additional briefing and reached the same result.<sup>137</sup> With Justice Souter retiring in the interim, Justice Stevens incorporated much of Justice Souter's draft dissent into his own—so much so that Stevens initially had a footnote in his dissent thanking Souter for his contributions to the dissent (a footnote that apparently his colleagues persuaded him to remove).<sup>138</sup> Was the additional briefing just window dressing, or did one or more of the Justices in the *Citizens United* majority believe the briefing actually was necessary to decide the issue? The window dressing idea is consistent with the long game, as it maintains the legitimacy of the Court while moving the law in the Justices' preferred direction.

Despite the (eventual) aggressiveness in *Citizens United* and then in *McCutcheon*, the Court has passed on some other opportunities to strike remaining campaign finance limits. It could have granted certiorari in the Republican National Committee's (RNC) renewed challenge to the soft money rules, but Justices Kennedy, Scalia, and Thomas could not get a fourth vote from Roberts or Alito.<sup>139</sup> Perhaps Chief Justice Roberts and Justice Alito were reluctant because the case was framed as an as-applied challenge rather than a straightforward call to overturn the soft money portion of *McConnell*; perhaps not.<sup>140</sup> The Court's refusal twice to consider overturning the *Beaumont* case upholding a bar on corporate contributions to candidates and its refusal to adopt strict scrutiny for review of campaign contribution limits in *McCutcheon* suggest a slower approach.<sup>141</sup> But outward aggressiveness may be unnecessary. The Court has already caused the existing campaign finance system to slowly implode. Ultimately we may well get to a deregulated system, but we are

---

135. For an exploration of the possible motives, see Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance by the Roberts Court*, 2009 SUP. CT. REV. 181, 195-222.

136. See HASEN, *supra* note 2, at 110.

137. *Id.*

138. MARCIA COYLE, *THE ROBERTS COURT: THE STRUGGLE FOR THE CONSTITUTION* 272 (2013); see also Adam Liptak, *Justice Stevens Suggests Solution for 'Giant Step in the Wrong Direction'*, N.Y. TIMES (Apr. 21, 2014), <http://nyti.ms/1lttKOP>; Jeffrey Toobin, *Money Unlimited: How Chief Justice John Roberts Orchestrated the Citizens United Decision*, NEW YORKER (May 21, 2012), <http://www.newyorker.com/magazine/2012/05/21/money-unlimited>.

139. See *supra* note 58 and accompanying text.

140. See *supra* note 58 (describing as-applied challenge in an earlier soft money case).

141. See *supra* Part I.A.

watching things move more slowly than if the Court acted more directly, and in a way in which the Court's fingerprints are not fully on the evidence.

Elsewhere I have suggested that Chief Justice Roberts has been willing to play the long game,<sup>142</sup> seeing no need to rush in moving the law in his preferred direction so as to preserve the Court's political capital and legitimacy. Justice Alito has played this game too, inviting litigants to file briefs raising issues, signaling an overruling, and queuing up issues for a future case.<sup>143</sup> The calculation may turn out to be incorrect with a potential shift in the balance of power on the Court should a Democratic president appoint a replacement for Justice Scalia, and it might be that the Court soon will be poised to move in a liberal direction. These Justices who seemed to have all the time in the world now have seen their time run out, or at least put on hold until there are other personnel changes on the Court.<sup>144</sup>

#### B. Mandatory Appellate Jurisdiction and Strategic Litigation Choices.

If the majority of the Court does lean conservatively on election law issues but at least a few Justices see a benefit in moving slowly, then the speed and direction of the Court's election law precedent may depend on which cases get to the Court and how they get there. Savvy players know this, and liberal and conservative litigants adopted different strategies when the Court had a five-Justice conservative majority.

As I demonstrated in an earlier article, liberal litigants during the Roberts Court era mostly tried to keep election law cases out of the Supreme Court, out of fear that the Court would be likely to make things worse.<sup>145</sup> The few times liberals pursued a different strategy, it backfired. Consider *Randall v. Sorrell*, where the successful campaign finance reformers defending Vermont's campaign finance law in the Second Circuit supported Supreme Court review.<sup>146</sup> Those reformers hoped that the Court would use the case to overrule that portion of *Buckley v. Valeo*<sup>147</sup> holding that campaign spending limits violate the First Amendment.<sup>148</sup> The Court in *Randall* not only rejected

---

142. Richard L. Hasen, Opinion, *The Chief Justice's Long Game*, N.Y. TIMES (June 26, 2013), <http://nyti.ms/12iDzI3>.

143. See Richard L. Hasen, *Anticipatory Overrulings, Invitations, Time Bombs, and Inadvertence: How Supreme Court Justices Move the Law*, 61 EMORY L.J. 779, 796 (2012).

144. Richard L. Hasen, Opinion, *Why the Most Urgent Civil Rights Cause of Our Time Is the Supreme Court Itself*, TPM (Sept. 28, 2015, 6:00 AM EDT), <http://talkingpointsmemo.com/cafe/supreme-court-greatest-civil-rights-cause>.

145. Hasen, *supra* note 18, at 330-32.

146. 548 U.S. 230, 239-40 (2006) (plurality opinion).

147. 424 U.S. 1, 57-59 (1976) (per curiam); see also *Randall*, 548 U.S. at 242-43 (plurality opinion).

148. Rick Hasen, *Supreme Court Election Law Preview*, ELECTION L. BLOG (Sept. 26, 2005, 1:50 PM), <http://electionlawblog.org/archives/004068.html> ("You can find six amicus briefs

*footnote continued on next page*

the challenge to *Buckley's* holding on spending limits;<sup>149</sup> it recognized a contribution limitation as unconstitutionally low for the first time.<sup>150</sup>

Similarly, in *Crawford*,<sup>151</sup> opponents of state voter identification laws (including me<sup>152</sup>) urged the Supreme Court to take the case to overturn a Seventh Circuit opinion by Judge Posner belittling the voting rights claims of the challengers.<sup>153</sup> The Court took the case and gave a national green light to voter identification laws, taking a bad Seventh Circuit precedent and making it national.<sup>154</sup> A few years later, Judge Posner changed his mind about these laws<sup>155</sup> and wrote a dissent from the Seventh Circuit's decision not to consider en banc a panel decision to uphold Wisconsin's voter identification law.<sup>156</sup> Indeed, it was quite controversial when the challengers to Wisconsin's law sought Supreme Court review in 2014. The Court denied review, much to the relief of many on the progressive side who feared the Court could nationalize bad Seventh Circuit precedent on the scope of section 2 vote denial claims.<sup>157</sup>

Some voting rights supporters are hoping for the Supreme Court to eventually rule against Texas's strict voter identification law, where a lower

---

supporting the winning side of the Second Circuit Sorrell case here. Usually, of course, the side that wins in the Court of Appeals opposes a grant of cert. But for years it has been the mission of some . . . such as NVRI . . . to try to get the Supreme Court to reconsider that aspect of *Buckley v. Valeo* striking down spending limits as violating the First Amendment rights of speech and association. Here's a chance, the argument must be, to push the issue, by noting the circuit split, and lining up some heavy hitters (current and former Senators, state Secretaries of State, state judges, and attorneys general) on the winning side to support review to revisit this issue in a high profile case. On reflection, I think this strategy could well backfire.”).

149. *Randall*, 548 U.S. at 244 (plurality opinion) (refusing to overrule *Buckley's* holding on spending limits).

150. *See id.* at 262.

151. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008).

152. Richard L. Hasen, *A Voting Test for the High Court*, WASH. POST (Sept. 19, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/09/18/AR2007091801572.html>.

153. *Crawford v. Marion Cty. Election Bd.*, 472 F.3d 949, 950, 952, 954 (7th Cir. 2007).

154. *Crawford*, 553 U.S. at 204.

155. John Schwartz, *Judge in Landmark Case Disavows Support for Voter ID*, N.Y. TIMES (Oct. 15, 2013), <http://www.nyti.ms/18jSPaK>. He has since moved away from that claim, saying only that he is sure he “may” have been wrong. Richard A. Posner, *I Did Not ‘Recant’ on Voter ID Laws*, NEW REPUBLIC (Oct. 27, 2013), <http://www.newrepublic.com/article/115363/richard-posner-i-did-not-recant-my-opinion-voter-id>.

156. *Frank v. Walker*, 773 F.3d 783, 783 (7th Cir. 2014) (Posner, J., dissenting from denial of rehearing en banc).

157. *Frank v. Walker*, 17 F. Supp. 3d 837, 862-63, 879 (E.D. Wis. 2014) (holding that Wisconsin's voter identification law violated Voting Rights Act section 2 and the U.S. Constitution's Equal Protection Clause, and enjoining law's use in elections), *rev'd*, 768 F.3d 744 (7th Cir.), *reh'g en banc denied by an equally divided court*, 773 F.3d 783 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 1551 (2015).



court made a finding of intentional racial discrimination in passing the law.<sup>158</sup> But this is risky business, which ultimately depends on whether liberals or conservatives control the Court at the time the Court would hear such a case. Consider the decision of the U.S. Solicitor General not to seek review of the D.C. Circuit's *SpeechNow* case, which opened up the era of Super PACs by striking down the limits on contributions to political action committees that do not contribute directly to candidates.<sup>159</sup> The calculation may have been that the Supreme Court would only have made things worse.

While liberals were mostly trying to keep cases out of the Roberts Court, conservatives were trying to get them into the Court.<sup>160</sup> They have a great tool to do so in certain cases: mandatory appellate jurisdiction. Most cases get to the Supreme Court on a discretionary petition for writ of certiorari. Denial of certiorari has no precedential value, meaning that litigants cannot rely upon the Court's decision not to hear the case as an indication that the lower court got it right.<sup>161</sup> However, by virtue of federal statutes, certain voting rights, redistricting, and campaign finance cases come to the Supreme Court directly on appeal from a three-judge federal district court.<sup>162</sup>

When the Court considers an appeal, it can summarily affirm or dismiss, summarily reverse, or note probable jurisdiction and set the case for argument.

---

158. *Veasey v. Abbott*, 796 F.3d 487, 493 (5th Cir. 2015). The Fifth Circuit will rehear the case en banc. *Veasey v. Abbott*, 815 F.3d 958 (5th Cir. 2016) (mem.).

159. *SpeechNow.org v. FEC*, 599 F.3d 686, 689, 696 (D.C. Cir. 2010) (en banc); Lyle Denniston, *No Appeal in SpeechNow*, SCOTUSBLOG (June 17, 2010, 11:55 AM), <http://www.scotusblog.com/2010/06/no-appeal-in-speechnow> ("The government's top lawyer in Supreme Court cases decided Thursday not to ask the Justices to revive a federal law that restricted the amount of money that independent political advocacy groups can raise for their efforts to influence the election of members of Congress and the presidency. . . . Katyal's decision was unexpected, since the Justice Department rarely declines to come to the defense of the constitutionality of a federal law that has been nullified by a lower court. Even so, the prospect of persuading the Supreme Court to overturn the Circuit Court ruling was not a bright one. The Circuit Court had said that the result was virtually dictated by the Supreme Court's controversial ruling last January, in *Citizens United v. FEC*.").

160. See generally Hasen, *supra* note 18 (describing liberal and conservative attempts to get the Supreme Court under Chief Justice John Roberts to consider election law cases). The great irony here is that the three-judge court in voting rights cases long served as a weapon of liberals to keep cases out of the hands of single conservative judges opposed to a strong reading of the Voting Rights Act. See Michael E. Solimine, *Congress, Ex Parte Young, and the Fate of the Three-Judge District Court*, 70 U. PITT. L. REV. 101, 126-29 (2008).

161. For discussions of issues related to mandatory appellate jurisdiction and election law, see Joshua A. Douglas, *The Procedure of Election Law in Federal Courts*, 2011 UTAH L. REV. 433, 433-35; Hasen, *supra* note 18, at 328 n.12; and Michael E. Solimine, *The Three-Judge District Court in Voting Rights Litigation*, 30 U. MICH. J.L. REFORM 79, 81-82, 132-33 (1996).

162. See Douglas, *supra* note 161, at 456 (describing federal statutes establishing special appellate procedures in certain election law cases).

A decision to affirm or dismiss is precedential, and it means that the lower courts got the result right (although perhaps not the reasoning). For this reason, the Justices appear much more reluctant to let things slide in a case on appeal than on a petition for certiorari; they feel much more of an obligation to hear the case.

Consider this exchange between Chief Justice Roberts and lawyer (and former Solicitor General) Ted Olson in the first *Citizens United* oral argument:

MR. OLSON:

...I said at the beginning that this is an incomprehensible prohibition, and ... I think that's demonstrated by the fact that since 2003 this Court has issued something close to 500 pages of opinions interpreting and trying to apply the First Amendment to Federal election law. And I counted 22 separate opinions from the Justices of this Court attempting to—in just the last 6 years, attempting to figure out what this statute means, how it can be interpreted. In fact—

CHIEF JUSTICE ROBERTS: Well, that's because it's mandatory appellate jurisdiction. I mean, you don't have a choice.

(Laughter.)<sup>163</sup>

Of the thirty election law cases from 2006 to 2015 in which the Roberts Court issued an opinion, fourteen of them came to the Court on mandatory appellate review.<sup>164</sup> *Shelby County*, which was decided through a normal petition for certiorari, started with an attempt to get a three-judge court.<sup>165</sup> At the recent oral argument in the *Shapiro v. McManus* case, concerning when three-judge courts are appropriate in the face of an argument that a plaintiff is raising frivolous claims, Chief Justice Roberts again expressed his belief that mandatory appellate jurisdiction forces the Court's hand:

CHIEF JUSTICE ROBERTS: I mean, the other alternative is it's a three-judge district court, and then we have to take it on the merits. I mean, that's a serious problem because there are a lot of cases that come up in three-judge district courts that would be the kind of case—I speak for myself, anyway—that we might deny

---

163. Transcript of Oral Argument at 18-19, *Citizens United v. FEC*, 558 U.S. 310 (2010) (No. 08-205), [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/08-205.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-205.pdf).

164. See *infra* Appendix; see also Hasen, *supra* note 18, at 328 n.12 (noting that about half the cases from 2001 to 2010 arrived at the Court via mandatory appellate jurisdiction).

165. See David Gans, *The Role of Three-Judge Courts in Conservative Attacks on Campaign Finance Reform and Voting Rights*, BALKINIZATION (June 12, 2015, 10:40 AM), <http://balkin.blogspot.com/2015/06/the-role-of-three-judge-courts-in.html> (“When *Shelby County v. Holder* was filed, the plaintiffs requested that it be heard by a three-judge court. The district judge in the case, however, determined that it should be heard by him alone.”).

cert in, to let the issue percolate. And now with the three-judge district court, no, we have to decide it on the merits.<sup>166</sup>

Three cases in the October 2015 Term came to the Court on mandatory appellate review.<sup>167</sup> Indeed, the Supreme Court refused to consider the one person, one vote issue when it arrived at the Court via a petition for certiorari in 2001, over the objections of Justice Thomas,<sup>168</sup> only to decide to hear the same issue fourteen years later in *Evenwel*.<sup>169</sup> It looks like plaintiffs in *Evenwel* pursued the three-judge court as a deliberate strategy.<sup>170</sup>

There are limits to the strategizing, however, as case law develops about when three-judge courts are appropriate in particular types of cases. Further, mandatory appellate jurisdiction does not always lead to conservative results. It did in *Citizens United*, *McCutcheon*, and (to some extent) in *NAMUDNO*, but it did not in the Arizona or Alabama redistricting cases.

Appellate jurisdiction does seem to boost the odds of getting the Court to hear a case, making it worthwhile in the period before Justice Scalia's death to pursue if one was a conservative litigant. The RNC recently dropped a new challenge to some party-related soft money rules after the case was rejected for consideration by a three-judge court<sup>171</sup> and put instead on track for en banc

---

166. Transcript of Oral Argument at 38, *Shapiro v. McManus*, 136 S. Ct. 450 (2015) (No. 14-990), [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/14-990\\_3f14.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/14-990_3f14.pdf).

167. See *Wittman v. Personhuballah*, 136 S. Ct. 1732 (2016); *Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S. Ct. 1301 (2016); *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016).

168. *Chen v. City of Houston*, 532 U.S. 1046, 1046-47 (2001) (Thomas, J., dissenting from denial of certiorari).

169. Adam Liptak, *With Subtle Signals, Supreme Court Justices Request the Cases They Want to Hear*, N.Y. TIMES (July 6, 2015), <http://www.nyti.ms/1KLZVG>.

170. As reporter Tony Mauro explained:

Texas voters Sue Evenwel and Ed Pfenninger were recruited for the lawsuit to claim that their state Senate districts were improper because they contain more registered voters than are needed in urban districts. As with the affirmative action and voting rights cases, Blum found the plaintiffs with a Supreme Court challenge in mind. Blum mounted a similar lawsuit against using total population in drawing districts in *Lepak v. City of Irving*, which the Supreme Court declined to review in 2013.

Aided by lawyers from Wiley Rein, including William Consovoy who last year left to create Consovoy McCarthy, Blum tried again. This time, instead of a petition for certiorari, the *Evenwel* case came to the court through a different route—a challenge to a statewide redistricting program that is by law reviewed by a three-judge federal district court panel. That panel upheld the Texas districts, paving the way for Blum to appeal through a “jurisdictional statement” rather than certiorari.

Tony Mauro, *The Man Behind the Newest Supreme Court Voting Case*, NAT'L L.J. (May 26, 2015), <http://www.nationallawjournal.com/id=1202727397771/The-Man-Behind-the-Newest-Supreme-Court-Voting-Case>.

171. Order at 1, *Republican Nat'l Comm. v. FEC*, No. 1:14-cv-00853 (D.D.C. Aug. 19, 2014), [http://www.fec.gov/law/litigation/rnc\\_order\\_081914.pdf](http://www.fec.gov/law/litigation/rnc_order_081914.pdf) (denying request for a three-judge court). See generally Matea Gold, *RNC Files Lawsuit Seeking to Raise*

*footnote continued on next page*

D.C. Circuit review,<sup>172</sup> to be followed by a possible petition for certiorari.<sup>173</sup> After dismissing the last suit, the Republican Party of Louisiana, with the same lawyer (campaign finance opponent Jim Bopp), then filed a new soft money challenge, requesting a three-judge court.<sup>174</sup> It was granted the three-judge court,<sup>175</sup> making Court review much more likely.<sup>176</sup>

### C. Conservative Variance.

Variation in the views of conservative Justices is the third reason the Court in election law cases did not move as sharply to the right as it could have. Despite caricatures by some liberals, the conservative Justices are far from monolithic. For example, Justice Thomas is an ardent opponent of campaign disclosure laws,<sup>177</sup> while Justice Scalia was an enthusiastic supporter.<sup>178</sup> Chief Justice Roberts, perhaps for institutional reasons or a different view of the problems with an elected judiciary, broke with his conservative colleagues in *Williams-Yulee* by upholding under strict scrutiny Florida's ban on personal campaign solicitations by judicial candidates.<sup>179</sup> Justice Kennedy, who grew up in initiative-rich California and who alone among conservatives has expressed

---

*Unlimited Sums*, WASH. POST: POST POLITICS (May 23, 2014, 4:30 PM), <http://wpo.st/hyNH1> (discussing the RNC filing the lawsuit against the FEC).

172. Certification Order at 1-3, *Republican Nat'l Comm.*, No. 1:14-cv-00853, [http://www.fec.gov/law/litigation/rnc\\_dc\\_cert\\_order.pdf](http://www.fec.gov/law/litigation/rnc_dc_cert_order.pdf) (making certain factual findings and certifying issues to the en banc D.C. Circuit).

173. However, a year later the RNC, without explanation, voluntarily dismissed the lawsuit. Stipulation Dismissing Plaintiffs and Action, *Republican Nat'l Comm.*, No. 1:14-cv-00853, [http://www.fec.gov/law/litigation/rnc\\_joint\\_dismissal.pdf](http://www.fec.gov/law/litigation/rnc_joint_dismissal.pdf).

174. Verified Complaint for Declaratory and Injunctive Relief at 50-51, *Republican Party of La. v. FEC*, No. 15-cv-01241 (D.D.C. Aug. 3, 2015), <http://electionlawblog.org/wp-content/uploads/soft-money-complaint.pdf>.

175. Memorandum Opinion at 4, *Republican Party of La.*, No. 1:15-cv-01241, [http://www.fec.gov/law/litigation/lagop\\_dc\\_opinion.pdf](http://www.fec.gov/law/litigation/lagop_dc_opinion.pdf) (granting request for a three-judge court).

176. Richard L. Hasen, Opinion, *The McCain-Feingold Act May Doom Itself*, NAT'L L.J. (Aug. 17, 2015), <http://www.nationallawjournal.com/id=1202734808860/OpEd-The-McCainFeingold-Act-May-Doom-Itself>.

177. See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 480-85 (2010) (Thomas, J., concurring in part and dissenting in part) (dissenting on disclosure issues).

178. See, e.g., *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 385 (1995) (Scalia, J., dissenting) ("I can imagine no reason why an anonymous leaflet is any more honorable, as a general matter, than an anonymous phone call or an anonymous letter. It facilitates wrong by eliminating accountability, which is ordinarily the very purpose of the anonymity."); see also *Doe v. Reed*, 561 U.S. 186, 228 (2010) (Scalia, J., concurring in the judgment) ("I do not look forward to a society which, thanks to the Supreme Court, campaigns anonymously (*McIntyre*) and even exercises the direct democracy of initiative and referendum hidden from public scrutiny and protected from the accountability of criticism. This does not resemble the Home of the Brave.").

179. *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1672 (2015).

misgivings about partisan gerrymanders,<sup>180</sup> broke with his conservative colleagues in the Arizona redistricting case, upholding initiative-driven redistricting commissions.<sup>181</sup> Justice Kennedy also has his own views on the scope of section 2 of the Voting Rights Act<sup>182</sup> and the racial gerrymandering cause of action,<sup>183</sup> sometimes causing him to side with the Court's liberals.

To some extent, this variance is explained by the relative moderation of Justice Kennedy and Chief Justice Roberts compared with Justices Alito, Scalia, and Thomas. But as the campaign finance disclosure cases show, there remains division even among the Court's most reliable conservatives.

The Court's reticence should not be overstated. The Roberts Court was still a very conservative Court in its election law jurisprudence, and it moved aggressively in cases such as *Citizens United* and *Shelby County*. *Citizens United* has started the country's campaign finance law down a slow but steady decline, and *Shelby County* has removed a key protection for minority voters, leading to a spate of new laws in previously covered jurisdictions that make it harder to register and vote.<sup>184</sup> But a more nuanced picture shows that, for a variety of reasons, the Roberts Court's election law jurisprudence actually could have been far worse—and could still get worse depending upon the speed with which cases reach the Court, the appetite of the Justices, and potential changes in Supreme Court personnel over the next few years.

### III. Options for Election Reform in the Roberts Court Era

What space remains for progressive election reform after the Court's sharp right, but not maximalist, turn? To begin with, we are entering a period of great uncertainty as to the ideological balance on the Court. With Justice Scalia's death, there is the possibility that the Court will swing to the left, at least for a time, if Justice Scalia is replaced by a liberal or moderate Justice.

---

180. See *Vieth v. Jubelirer*, 541 U.S. 267, 316 (2004) (Kennedy, J., concurring in the judgment).

181. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658-59, 2668 (2015).

182. *League of United Latin Am. Citizens (LULAC) v. Perry*, 548 U.S. 399, 433-35 (2006); see *supra* note 73 and accompanying text (describing Justice Kennedy's cultural compactness approach in this case, which supported voting rights plaintiffs in *Perry*).

183. *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1262-63 (2015); see Hasen, *supra* note 81, at 359-60, 370-71 (describing Justice Kennedy's embrace of the racial gerrymandering cause of action by liberal plaintiffs in the *Alabama* case).

184. Jim Rutenberg, *A Dream Undone*, N.Y. TIMES MAG. (July 29, 2015), <http://nyti.ms/1JRdm5o> [hereinafter Rutenberg, *A Dream Undone*] (describing new voting restrictions in previously covered jurisdictions); Jim Rutenberg, *The New Attack on Hispanic Voting Rights*, N.Y. TIMES MAG. (Dec. 17, 2015), <http://nyti.ms/1O8la4D> [hereinafter Rutenberg, *The New Attack*] (focusing on Latino voting rights in Pasadena, Texas, a previously covered jurisdiction).

During such a period, election law is unlikely to get more conservative, and the question will become the extent to which a new liberal Supreme Court majority would be willing to overturn or limit Roberts Court precedents such as *Citizens United* and *Shelby County*.

But with other potential changes in Court personnel over the next half-decade, it is by no means certain that a progressive Court majority will be enduring. Indeed, depending upon political forces, the Court could see shifting ideological majorities over the next decade.

Unless and until the Court moves its doctrine significantly, the space for progressive election reform under current Court doctrine varies by substantive area.

#### A. Campaign Finance Reform.

As to campaign finance, the Court has greatly constrained the reforms that are possible. As the law currently stands, only campaign disclosure laws appear immune from eventual successful attack. Campaign contribution limits are under increasing pressure thanks to *Citizens United* and *McCutcheon*, with the logic of those decisions endangering the corporate contribution ban, the soft money ban, and even limits on contributions to candidates. While the Court has been thus far unwilling to doctrinally pull the trigger to kill what remains of campaign finance limits, the tremendous growth of Super PACs and other groups has put campaign finance into a kind of death spiral. The rise of Super PACs has led some to call for lifting limits on parties and campaigns on the theory that these groups are more responsible and funding them will decrease polarization.<sup>185</sup> During oral argument in the *McCutcheon* case, for example, Justice Scalia relied on the fact that we are not “stopping people from spending big money on politics”<sup>186</sup> to argue for further deregulation. It is an increasingly common refrain.

Even if the Court did not strike any additional campaign limits, there is little that can be done under current doctrine beyond trying to maintain the status quo. To be sure, the federal government and reformers should defend existing laws, including disclosure laws. Reformers scored a rare victory when the United States Court of Appeals for the D.C. Circuit sitting en banc recently upheld unanimously the ban on direct campaign contractor contributions to

---

185. See, e.g., Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 YALE L.J. 804, 839 (2014) (“[I]n a world in which individuals can contribute unlimited amounts to issue-advocacy Super PACs, including Super PACs dedicated to one specific candidate or issue, are we better off sharply limiting contributions to parties or their ability to engage in coordinated spending with candidates?” (citation omitted)).

186. Transcript of Oral Argument at 31, *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014) (No. 12-536), [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/12-536\\_2k81.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-536_2k81.pdf).

candidates.<sup>187</sup> So far the ban on corporate contributions to candidates has also held.<sup>188</sup>

Beyond the status quo, public financing, especially through vouchers, deserves reformers' efforts—although the Court's decision in the Arizona public financing case has called into question any plan aimed at leveling the playing field.<sup>189</sup> But new and meaningful limits, on contributions to Super PACs for example, seem unlikely to survive judicial review under current doctrine given cases such as *Citizens United* and *SpeechNow*.

Reform plans, such as multiple-match public financing plans, are second-best solutions given that the Court has blocked serious limits on spending and contributions by the wealthiest actors. The problem is not that reformers have a "romanticized" vision of democracy that ignores the role political parties must play in making democracy work.<sup>190</sup> It is that the structural impediments erected by the Court have hobbled what could otherwise be effective reform efforts. It likely will take a progressive Supreme Court reversing *Citizens*

---

187. *Wagner v. FEC*, 793 F.3d 1, 3, 32 (D.C. Cir. 2015) (en banc).

188. *See supra* Part I.A.

189. *See Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2824-25 (2011) (confirming the rejection of the equalization rationale as a constitutionally permissible basis for campaign finance regulation); HASEN, *supra* note 2, at 186 (discussing how *Bennett*, the Arizona public financing case, could undermine multiple-match public financing plans).

190. For "realist" critiques of reformers along these lines, see BRUCE E. CAIN, *DEMOCRACY MORE OR LESS: AMERICA'S POLITICAL REFORM QUANDRY* 6 (2015); JONATHAN RAUCH, *POLITICAL REALISM: HOW HACKS, MACHINES, BIG MONEY, AND BACK-ROOM DEALS CAN STRENGTHEN AMERICAN DEMOCRACY* 30 (2015), <http://www.brookings.edu/~media/Research/Files/Reports/2015/04/political-realism-rauch/political-realism-rauch.pdf?la=en>; Pildes, *supra* note 185, at 850-51; and Ray LaRaja & Brian Schaffner, *Want to Reduce Polarization? Give Parties More Money*, WASH. POST: MONKEY CAGE (July 21, 2014), <http://wpo.st/RzNH1>. For responses, see THOMAS E. MANN & E.J. DIONNE, JR., *THE FUTILITY OF NOSTALGIA AND THE ROMANTICISM OF THE NEW POLITICAL REALISTS* 1-2 (2015), <http://brook.gs/1GcuFf8>; Mark Schmitt, *Democratic Romanticism and Its Critics*, 36 *DEMOCRACY J.* (2015), <http://democracyjournal.org/magazine/36/democratic-romanticism-and-its-critics>; Lee Drutman, *Can Unlimited Contributions to Political Parties Really Reduce Polarization?*, WASH. POST: MONKEY CAGE (June 23, 2015), <http://wpo.st/H-OH1>; and Richard L. Hasen, *Democracy for Grownups: Review of Democracy More or Less: America's Political Reform Quandary*, by Bruce E. Cain, *NEW RAMBLER REV.* (Nov. 9, 2015), <http://newramblerreview.com/book-reviews/law/democracy-for-grownups>. Richard Pildes in particular makes the argument that campaign finance vouchers may exacerbate polarization. Pildes, *supra* note 185, at 827 ("Democratizing campaign contributions through vouchers might well, ironically, fuel the flames of political polarization, as compared to public financing systems funded in the more traditional way, through general revenues."). In HASEN, *supra* note 2, at 156-59, I suggest that widely used campaign finance vouchers could actually decrease polarization, by bringing many more voters into the process of distributing campaign money. I acknowledge, however, the risk of vouchers to political parties and recognize it might be necessary to have a portion of vouchers distributed directly to political parties for this reason.

*United* and *Buckley* to provide the opportunity to enact comprehensive campaign reform and then to see the effects of more than a half-hearted reform upon governance.<sup>191</sup>

#### B. Voting Rights Act Reform.

The space for improving the Voting Rights Act is not quite as cramped as for campaign finance reform, but options are still limited. The Court in *Shelby County* quashed section 5 (by striking the coverage formula of section 4) at a time when Republicans in Congress have moved away from their past support for preclearance.<sup>192</sup> The Voting Rights Amendment Act (VRAA) designed to partially restore preclearance, although co-sponsored by former House Judiciary Chair James Sensenbrenner (who shepherded through the 2006 VRA renewal), never even got a hearing in the Republican-led House and has very few Republican co-sponsors.<sup>193</sup>

The stalemate over a new coverage formula creates a political problem, but it obscures a more fundamental legal one. It is not clear that any new approaches to preclearance, such as the VRAA's proposal to use violations of section 2 to trigger new preclearance obligations,<sup>194</sup> would pass constitutional muster in the Supreme Court under current doctrine. To the extent *Shelby County* requires evidence of current *constitutional* violations, and many section 2 violations do not require proof of unconstitutionality, the current Roberts Court could well reject the revised preclearance formula as exceeding congressional power or a violation of the "equal sovereignty" principle which says that the federal government must, at least sometimes, treat states equally.<sup>195</sup>

As for the currently-drafted section 2, we may have reached the limits of its potential for reform. Section 2 redistricting claims appear to have been brought in most larger jurisdictions where there was good potential for courts

---

191. I make this case in HASEN, *supra* note 2, at 176-89.

192. Stephanie Condon, *Does America Need to Restore the Voting Rights Act?*, CBS NEWS (Aug. 5, 2015, 6:00 AM), <http://www.cbsnews.com/news/does-america-need-to-restore-the-voting-rights-act> (tracing the history of Republican views on preclearance renewal).

193. See Kate Nocera, *Judiciary Chairman in No Rush to Move on Voting Rights Act Bill*, BUZZFEED (June 26, 2014, 1:33 PM), <http://www.buzzfeed.com/katenocera/judiciary-chairman-in-no-rush-to-move-on-voting-rights-act-r>; Sue Sturgis, *Honoring Voting Rights Heroes, Blocking Voting Rights Restoration*, INST. FOR SOUTHERN STUD. (Feb. 25, 2016, 1:45 PM), <http://www.southernstudies.org/2016/02/honoring-voting-rights-heroes-blocking-voting-righ.html> ("Of the 13 Republican co-sponsors of the Voting Rights Amendment Act, only two represent Southern states . . .").

194. Voting Rights Amendment Act of 2014, H.R. 3899, 113th Cong. § 3 (2014), <https://www.congress.gov/bill/113th-congress/house-bill/3899>.

195. See Leah M. Litman, *Inventing Equal Sovereignty*, 114 MICH L. REV. 1207, 1210-13 (2016) (critiquing equal sovereignty concept).



to order the creation of additional minority opportunity districts (although new issues arise after each round of redistricting in jurisdictions with such districts). The Department of Justice, even under a Democratic administration, has brought very few section 2 suits in recent years.<sup>196</sup> The Court's refusal in *Bartlett* to recognize crossover district claims and *LULAC*'s rejection of influence-district claims prevented further expansion of section 2's reach in redistricting cases, and the redefinition of cultural compactness in *LULAC* may endanger some existing section 2 districts.<sup>197</sup>

Section 2 vote denial claims, such as claims against the legality of onerous voter identification laws, face a different problem. A conservative Supreme Court would be likely to shut down this path given the high bar to prove a section 2 violation.<sup>198</sup> If courts limit section 2's application to vote denial claims, as the Seventh Circuit recently did in the Wisconsin case,<sup>199</sup> congressional Republicans are unlikely to support an amendment to strengthen section 2. Even if Congress amended section 2 to make vote denial claims easier to bring, a conservative Supreme Court could very well strike down such an amendment as an unconstitutional exercise of congressional power under *Shelby County* absent proof of actual constitutional violations by the states.

Thus, while the Voting Rights Act has accomplished much, we now have a weakened set of Voting Rights Act protections for minority voters, protections that do not appear in immediate danger of being completely killed by the Supreme Court but without immediate political or legal prospects for strengthening, barring a shift in the ideological balance on the Court.

### C. Partisan Gerrymandering Reform.

Things are brighter from a reform perspective on the use of direct democracy to police partisan gerrymandering and other legislative conflicts of interest. The Court's recent *Arizona*<sup>200</sup> decision has removed a cloud from

---

196. Since 2008, the Department of Justice under the Obama Administration has filed only four section 2 suits (and intervened in one section 2 suit) involving redistricting. For a list, see U.S. DEP'T OF JUSTICE, *Cases Raising Claims Under Section 2 of the Voting Rights Act*, [http://www.justice.gov/crt/about/vot/litigation/recent\\_sec2.php](http://www.justice.gov/crt/about/vot/litigation/recent_sec2.php) (last updated Oct. 7, 2015).

197. *Bartlett v. Strickland*, 556 U.S. 1, 13-18 (2009); *League of United Latin Am. Citizens (LULAC) v. Perry*, 548 U.S. 399, 433-34 (2006). On *LULAC* reducing the number of section 2 districts, see Nicholas O. Stephanopoulos, *The South After Shelby County*, 2013 SUP. CT. REV. 55, 79 n.80, 96, 103.

198. For a look at how courts have thus far evaluated such claims, see Tokaji, *supra* note 92, at 448, 463-64, 467.

199. *Frank v. Walker*, 768 F.3d 744, 745, 751, 753 (7th Cir.), *reh'g en banc denied by an equally divided court*, 773 F.3d 783 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 1551 (2015).

200. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015).

efforts to use initiatives to push electoral commissions, fair districting amendments, political primary reform, and other experimentation applied to congressional elections. These experiments may not always be wise; top-two primaries, for example, may not be providing the ideological moderation that its supporters predicted.<sup>201</sup> Independent commissions might be more apt than legislators to draw competitive districts, but competitiveness may mean that more voters within each district are dissatisfied with their legislative representation.<sup>202</sup> The Court's *Arizona* and *Washington State Grange*<sup>203</sup> cases properly put the question of some reforms into the hands of voters rather than the courts.

#### D. Election Administration Reform.

The biggest arena in which the Court's rulings have opened room for political action is election administration. The Court's *Shelby County*<sup>204</sup> decision ended federal oversight of election administration changes in covered jurisdictions. The Court's *Crawford*<sup>205</sup> decision gave the green light for states to enact strict voter identification laws, even along party lines, apparently free of federal constitutional claims. With this space widely opened, many Republican legislatures have seized the opportunity to tighten up registration and voting rules.<sup>206</sup>

The battle over election rules continues to play out partially in court, with cases being filed in both state and federal courts. In the 2013-2014 election season, the high rate of election litigation the country has witnessed since *Bush v. Gore* increased slightly.<sup>207</sup> With 266 cases in 2013 and 302 cases in 2014, the

---

201. Volume 7, Issue 1 of the *California Journal of Politics and Policy* contains articles debating the merits of and analyzing data on California's switch to a top-two primary. The issue is posted at <http://escholarship.org/uc/search?entity=cjpp;volume=7;issue=1>. See also David Siders, *New Research Offers Four Lessons from California's Top-Two Primary*, SACRAMENTO BEE (Feb. 7, 2015, 4:01 PM), <http://sacbee.com/2tna> (describing research findings).

202. Persily, *supra* note 109, at 680 (describing inevitable tradeoffs in redistricting goals).

203. See generally *Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. at 2671 (approving power of voters to adopt redistricting reform via voter initiative); *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442 (2008) (upholding voter-approved measure establishing a top-two primary).

204. *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2631 (2013).

205. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 185-89 (2008).

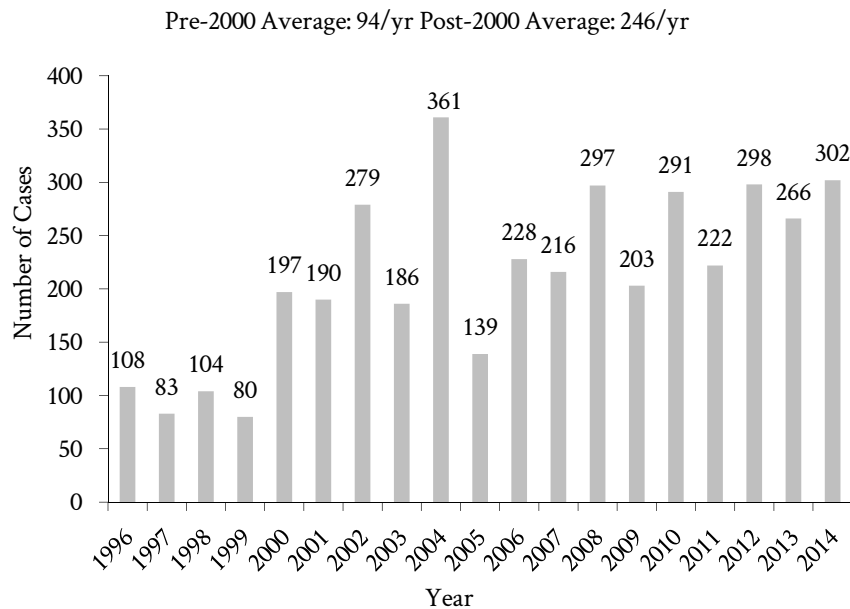
206. See Rutenberg, *A Dream Undone*, *supra* note 184 (describing fights over post-*Shelby County* voting restrictions); Rutenberg, *The New Attack*, *supra* note 184 (same).

207. For the data through 2010 and the methodology used to compute these figures, see Hasen, *supra* note 18, at 327 & n.9, 329 fig.3. For 2011-2012, see Hasen, *supra* note 91, at 1870-71 & nn. 41-43. I have posted the 2013-2014 data at Richard L. Hasen, Election Challenge 2013-14 (n.d.), <http://electionlawblog.org/wp-content/uploads/election>

*footnote continued on next page*

post-2000 “election challenge” litigation average rose from 242.5 cases per year<sup>208</sup> to 246 per year.<sup>209</sup> By contrast, the pre-*Bush v. Gore* average was 94 cases per year.

**Figure 1**  
“Election Challenge” Cases per Year: 1996-2014



#### E. Expectations for the Future.

Over the next few years, with the Supreme Court’s composition uncertain, it is unclear how federal challenges to election administration rollbacks by Republican legislatures under section 2 of the Voting Rights Act and the Constitution’s Equal Protection Clause will fare. It is even harder to predict how things will go with state law challenges, given each state’s own

-challenge-2013-14.xlsx. I have calculated the data used in Figure 1 from these datasets.  
*See id.*

208. Hasen, *supra* note 91, at 1871.

209. *See* Hasen, *supra* note 207.

constitutional voting protections and the politics and precedents of each state's supreme court.<sup>210</sup>

Where litigation fails, election administration battles will shift increasingly from the legal arena to the political arena. Polarization and decentralization of election administration questions have already led to the emergence of “red state election law” and “blue state election law,” with voting restrictions increasingly enacted in many Republican-leaning states but not Democratic-leaning states or states with mixed control.<sup>211</sup> In places such as North Carolina, “Moral Monday” protests have focused upon election law rollbacks and other changes.<sup>212</sup> We should expect to see social protests and agitation elsewhere, with election administration rules shifting as partisan control of state governments shifts. In states with shifting electoral majorities, election law will likely shift as well, although the election law changes themselves have the potential to affect which party holds state legislatures and governorships.

### Conclusion

My argument is not that things were not as bad as they appeared at the Roberts Court. *Citizens United* and *Shelby County* in particular are significant, detrimental decisions that have already shaped and will continue to shape our national politics. I have focused this Essay on why the Court with five conservative Justices did not go even further in a conservative direction and what reformers can do in light of the Court's rulings. In many arenas, meaningful reform options will have to await a change in the balance of power on the Court or in Congress. In other arenas, the fights will be in both the state courtroom and in state capitols, where the partisanship of election disputes often is more direct and predictable than at the U.S. Supreme Court. Perhaps the most interesting question about the Court ten years from now will be whether a new liberal Supreme Court has moved as far as it could have away from the positions taken during the first ten years of the Roberts Court.

---

210. See generally Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89 (2014) (describing the right to vote under state constitutions); Joshua A. Douglas, *State Judges and the Right to Vote*, 77 OHIO ST. L.J. 1 (forthcoming 2016) (describing the role of state judges in protecting voting rights), [http://papers.ssrn.com/abstract\\_id=2495078](http://papers.ssrn.com/abstract_id=2495078).

211. Hasen, *supra* note 7.

212. Ari Berman, *The 2015 Moral Monday Movement: 'North Carolina is Our Selma,'* NATION (Feb. 12, 2015), <http://www.thenation.com/article/2015-moral-monday-movement-north-carolina-our-selma>.

## Appendix

### Roberts Court Election Law Opinions 2006-2015

(\* = appeal from three-judge court)

1. *Wisconsin Right to Life, Inc. v. FEC*, 546 U.S. 410 (2006)\*<sup>†</sup>
2. *Lance v. Dennis*, 546 U.S. 459 (2006)\*
3. *Randall v. Sorrell*, 548 U.S. 230 (2006)
4. *League of United Latin American Citizens (LULAC) v. Perry*, 548 U.S. 399 (2006)\*
5. *Purcell v. Gonzalez*, 549 U.S. 1 (2006)
6. *Lance v. Coffman*, 549 U.S. 437 (2007)\*
7. *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007)\*
8. *New York State Board of Elections v. Lopez Torres*, 552 U.S. 196 (2008)
9. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442 (2008)
10. *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008)
11. *Riley v. Kennedy*, 553 U.S. 406 (2008)\*
12. *Davis v. FEC*, 554 U.S. 724 (2008)\*
13. *Brunner v. Ohio Republican Party*, 555 U.S. 5 (2008)
14. *Ysursa v. Pocatello Education Association*, 555 U.S. 353 (2009)
15. *Bartlett v. Strickland*, 556 U.S. 1 (2009)
16. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009)
17. *Northwest Austin Municipal Utility District Number One v. Holder*, 557 U.S. 193 (2009)\*
18. *Citizens United v. FEC*, 558 U.S. 310 (2010)\*
19. *Doe v. Reed*, 561 U.S. 186 (2010)
20. *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011)
21. *Nevada Commission on Ethics v. Carrigan*, 131 S. Ct. 2343 (2011)
22. *Perry v. Perez*, 132 S. Ct. 934 (2012)\*
23. *Tennant v. Jefferson County*, 133 S. Ct. 3 (2012)\*
24. *Shelby County v. Holder*, 133 S. Ct. 2612 (2013)
25. *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014)\*
26. *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334 (2014)
27. *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015)\*
28. *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656 (2015)
29. *Arizona State Legislature v. Arizona Independent Redistricting Commission*,  
135 S. Ct. 2652 (2015)\*
30. *Shapiro v. McManus*, 136 S. Ct. 450 (2015)

---

<sup>†</sup> This case was decided after Chief Justice Roberts joined the Supreme Court but before Justice Alito joined.